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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 359.

WILLIAM KELLY,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

General Electric Company, Respondent, respectfully submits that the above entitled Petition should be denied.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported in 110 F. Supp. 4; the opinion of the United States Court of Appeals for the Third Circuit is reported in 204 F. 2d 692.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A. Section 1254).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

In an action for personal injuries against a manufacturing company under the Federal Employers' Liability Act, did the Court below err in entering summary judgment for the Respondent where, in accordance with uncontradicted evidence and the findings of the trial Judge, the Respondent is not a common carrier by railroad engaged in commerce between the states, since it merely operated 2.17 miles of private trackage inside its own plant, moving its own goods to and from the sidings of the Pennsylvania Railroad within its plant enclosure?

STATUTES INVOLVED.

45 U. S. C. A. Section 51 (Federal Employers Liability Act).

Art. 17, Sec. 1. Constitution of Commonwealth of Pennsylvania.

COUNTER-STATEMENT OF THE CASE.

The only plausibility in Petitioner's Statement of Facts has been achieved by his misstatements and omissions of essential facts. Although the facts are clearly set forth in Judge Clary's able and comprehensive Opinion, we feel it our duty to point out to this Court the most flagrant of Petitioner's misstatements.

At the very beginning of his Statement of Facts (p. 4), it is said that Plaintiff "was run down by a switch engine owned by the Defendant General Electric Company on railroad tracks *near* the General Electric plant" * * * and at the time of the accident Defendant * * * "owned and operated railroad trains over its tracks at the scene of the accident." The fact is undisputed, however, that the accident occurred *within the Defendant's plant enclosure,* on

its private tracks maintained by Defendant solely as a plant facility for its own purposes.

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In the second paragraph of his Statement of Facts, Petitioner states (p. 4) that the incoming cars at Respondent's plant include cars "which have only part of their load consigned to them. *Thus, the remaining portion of the car contains goods of other consignees.*" From this, Petitioner would imply that in switching such cars Respondent performed a transfer service for such "other consignees." Apart from the fact that Respondent's yardmaster testified without contradiction that this had happened but once, to his knowledge, in 26 years (99a), "several years ago," even in that one case Respondent performed no transportation service for such other consignee, but merely shifted a car containing less than carload lots consigned to it and others, to its own unloading platform, removed its own goods and put the car back on the Pennsylvania Railroad siding.

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Petitioner further alleges (p. 5):

> "The General Electric Company also was permitted to construct its railroad across the city streets in the City of Philadelphia. This it could not do under Pennsylvania law unless it was a common carrier."

From this Petitioner would apparently have it appear that since Respondent had constructed tracks in the bed of a public street, it must be a common carrier, because in Pennsylvania only a common carrier can exercise the right of eminent domain. Under the uncontradicted facts, however, *the tracks were not laid in the exercise of the power of eminent domain, but with the express permission of the City of Philadelphia,* granted by Ordinance approved July 23, 1924 (Appendix, p. 135a). Furthermore, by ordinance approved May 4, 1926 (Appendix, p. 148a), 68th Street between Elmwood Avenue and the Pennsylvania Railroad was

stricken from the City Plan, thus permitting General Electric Company to construct not only its railroad tracks, but also an industrial plant with an iron fence completely enclosing it, across the former street.

• • •

Petitioner further states that under an agreement of 1925 between Respondent and the Pennsylvania Railroad, Respondent:

> "In the operation of its railroad agreed to conform, as a railroad must, with the requirements of the rules and regulations of the Interstate Commerce Commission with respect to the construction, maintenance and operation of the subject tracks." (p. 5)

This conclusion, which Petitioner sets forth as a fact, is derived by him from a standard paragraph in the Pennsylvania Railroad's printed form of siding agreement (133a), which provides as follows:

> "The Industry further agrees that the provisions of State and Federal statutes, as well as the rules, regulations and requirements of the Interstate Commerce Commission, or of the appropriate State Commission, with respect to construction, maintenance and operation of the Industries said sidetrack shall be complied with."

If Petitioner's interpretation of the effect of this clause were to be accepted, every industry which has a siding agreement with the Pennsylvania Railroad would be a common carrier.

• • •

Nowhere in his Statement of Facts or elsewhere does Petitioner mention the fact that on March 28, 1949, a week after the accident, Petitioner and Respondent entered into an agreement for workmen's compensation (reproduced at 28a-31a), which was duly approved by the Bureau of Workmen's Compensation at Harrisburg, Pennsylvania. Re-

spondent has regularly paid weekly compensation pursuant thereto, and has also paid medical expenses in amounts far in excess of the legal requirements (27a).

• • •

In addition to the facts stated by Judge Clary in his Opinion, the attention of this Court is directed to the Plan of the General Electric Company plant, set forth at p. 41a of the Record. This Plan discloses that the tracks are entirely within the plant enclosure, and that the tracks *do not* extend across any streets. The two tracks next to, but inside the fence, are on land owned by the Pennsylvania Railroad Company, and are the Pennsylvania Railroad sidings referred to in the Record and in the Opinion. It is on these tracks that General Electric Company picks up inbound cars and places outbound cars, so that the General Electric engines and crews operate entirely within the plant enclosure.

ARGUMENT.

1. The General Electric Company Does Not Operate a "Railroad" and Is Not a Common Carrier.

On page 7 Petitioner states that it is not contended that General Electric Company, with all its vast resources and operations, is a common carrier, but merely that in its railroad operations it is a common carrier.

Clearly, it requires no argument to demonstrate that respondent is not a railroad company within the meaning of Article 17, Section 1 of the Pennsylvania Constitution, providing that "all railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers."

The test as to whether a company operating a railroad is a common carrier is that set forth by this Court in the *Tap Line Cases, U. S. v. Louisiana & P. R. Co.*, 234 U. S. 1, 24:

> "It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business which is the real criterion determinative of its character."

Despite the general statement on page 12 of the present Petition, there is no serious contention that the public has the right to demand railroad services by General Electric Company in its plant, or to demand the use of the General Electric's tracks in the plant. Obviously, if any such right existed in the present case, then every industrial concern having private tracks within its plant, would be a common carrier.

The attempt by Petitioner to show that Respondent coordinated its rules and practices relative to safety with those of the Interstate Commerce Commission was wholly without success, the witness saying (123a, 124a): "We have nothing to do with the Interstate Commission" (See also page 127a). Similarly, the fact that by its siding agreement with the Pennsylvania Railroad in 1925 (133a) Re-

spondent agreed to comply with the rules, regulations and requirements of the Interstate Commerce Commission or the appropriate State Commission with respect to the construction, maintenance and operation of its sidetrack, in no way made the Respondent a common carrier engaged in interstate commerce.

As stated by Judge Clary in his Opinion (140a-141a), "a common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally." Judge Clary goes on to review the distinctive characteristics of a common carrier, and points out that Petitioner has made no showing that Respondent has any such characteristics. Nor has Petitioner made any such showing here. The fact is that there is no evidence which would support a finding that Respondent is a common carrier.

Petitioner argues strenuously that a Final Judgment should not have been rendered against him without a Jury trial. However, such a summary judgment is authorized by Rule 56 (c) of the Federal Rules of Civil Procedure, and is perfectly proper where, as here, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Although Petitioner and Respondent differ as to the conclusion to be drawn from the uncontradicted facts, clearly there is no issue of fact here such as must be determined by a Jury; nor can Petitioner create a jury question by misstating, misconstruing or omitting to consider uncontradicted evidence, the truth of which he does not question.

2. The Respondent Has Not Used its Railroad Tracks for the Transportation of Merchandise Belonging to Others.

Petitioner bases the above contention first on the ground that inbound shipments to Respondent in less than carload quantities contain merchandise belonging to others,

which Respondent hauls to its unloading platform and back to the Pennsylvania Railroad.

Apart from the fact that only one such instance apparently occurred in 26 years, this service, even if performed more often, would not constitute transportation of such merchandise for such other consignee, since all General Electric did was to put the car back where it got it. Admittedly, Respondent never charged another consignee for transportation service. What General Electric did was done solely for its own convenience in loading or unloading its own property, and added nothing to the service rendered by the common carrier to the other consignees.

The other circumstance relied on by Petitioner is that outgoing shipments are made F. O. B. the plant of the Respondent. This fact, however, by no means has the significance which Petitioner claims for it.

The billing F. O. B. did not pass title to the goods until they were delivered to the Pennsylvania Railroad Company. They were not the goods of the consignee when loaded on the cars within Respondent's plant any more than they were when packaged within its plant. The passage of title by reason of billing F. O. B. applies only *upon relinquishment of control* by the delivery of the consignment to an independent carrier, and not where the transporting agent is an employee of the consignor. As Judge Clary said, irrespective of whether title technically passed when the goods were loaded within the General Electric plant or by delivery to the Pennsylvania Railroad by General Electric outside its plant, the same situation doubtless obtains in the case of every plant facility.

See *Wenger v. Barnhart*, 55 Pa. 300;
Lewis v. Farmers Grain & Mill Co., 52 Cal. App. 211;
U. S. v. Andrews, 207 U. S. 229.

3. The Petitioner Refers to No Circumstance Supporting the Allowance of the Writ.

(a) There Is No Decision by Any Circuit Court of Appeals in Conflict With the Present.

The decision in *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C.A. 3, 1945), was by the same court which decided the case at bar, the opinion being rendered by Judge Maris, one of the three judges who heard and decided the present case. Nor is that case in conflict with the same court's present decision.

The question there was whether the defendant, which by its answer "admitted that it was engaged in doing business as a common carrier by railroad for hire under the laws of Pennsylvania," was engaged in interstate commerce so as to subject it to damages under the Federal Employers' Liability Act for injuries to a locomotive fireman. Defendant, a wholly owned subsidiary of the Pittsburgh Steel Company, operated a railroad having a main track 7½ miles in length, connecting the various works of the steel company with the Pittsburgh & Lake Erie and the Pittsburgh & West Virginia Railroad Companies, for which services defendant charged the Steel Company. It appeared that shortly before the accident defendant had moved a number of loaded cars consigned to the Steel Company from points outside Pennsylvania and a number of cars from its plant consigned to points outside Pennsylvania, and that the injured fireman had actually participated in all these movements. The Court held that:

> "it was not necessary for the plaintiff to show that either he or the defendant was engaged in the movement of an interstate shipment of freight at the very moment of injury. The evidence clearly established that the defendant habitually participated in the movement of interstate shipments of freight and that the plaintiff customarily assisted as a locomotive fireman in those movements." (p. 402)

In the case at bar, the Respondent did not as did the Monessen Southwestern Railroad, itself act as a railroad common carrier. It merely placed its own goods on the Pennsylvania Railroad siding. The amendment of August 11, 1939, to Section 1 of the Federal Employers' Liability Act, relied on by the court in that case, applies only to the employees of a "carrier," which Respondent clearly is not.

(b) The Court Below Has Not Decided an Important Question of Local Law in a Way Probably in Conflict With Applicable Local Decisions.

The decision of the Pennsylvania Superior Court in *Lehigh Navigation Coal Co. v. Pennsylvania Utility Commission et al.*, 133 Pa. Superior Ct. 67 (1938), does not at all hold what appellant claims for it. In that case O'Donnell Brothers, a retail coal dealer, had made an agreement with Lehigh Navigation Coal Company, a wholesale dealer, under which a sidetrack was constructed from O'Donnell's yard over the property of the Lehigh Company, connecting with the tracks of the Pennsylvania Railroad, and O'Donnell was given a license to use this sidetrack. When O'Donnell ceased to buy all their coal from the Lehigh Company, the latter refused to permit the use of the sidetrack on its property. A Pennsylvania statute (Section 406 of the Public Utility Law of 1937, 66 P. S. Section 1176) gave to any owner or operator of a private sidetrack the right to have a switch connection with the line of any adjacent railroad under certain conditions. The court held that the sidetrack "when connected with the Pennsylvania Railroad, constituted a part of the railroad's transportation facilities in the same manner as if constructed by the railroad company itself." "Appellant (the Lehigh Company), by its own conduct, clothed the property in question with the character of a utility facility, subject to public use upon payment of reasonable compensation; it voluntarily made its property a utility facility."

"The real question in the case," said the court, "is whether the titles of the Public Service Company Law and the Public Utility Law give sufficient notice of the particular ramifications of the subject," to comply with the requirement of Art. 3, Section 3 of the Pennsylvania Constitution.

There was there no contention that O'Donnell was a railroad or a common carrier. All that the case held was that the Lehigh Company, by permitting the construction of a sidetrack across its land to connect O'Donnell's property with that of the Pennsylvania Railroad made this sidetrack, under the Pennsylvania law, a part of the railroad's utility facilities. In the case at bar the General Electric Company built and used the sidetrack solely for its own benefit on its own property; nor could its construction and the connection of it with the railroad give anyone other than the General Electric Company the right to use it.

The court below has not decided an important question of Federal law which has not been but should be settled by this Court. The United States Supreme Court reports are full of decisions covering every phase of the problem of when a company is a common carrier by railroad engaged in interstate commerce.

For the foregoing reasons, the petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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